

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

COREY MICHAEL RIDDELL,

Defendant-Appellant.

UNPUBLISHED

July 24, 2007

No. 262413

Bay Circuit Court

LC No. 04-010434-FC

Before: Talbot, P.J., and Cavanagh and Meter, J.J.

PER CURIAM.

Defendant appeals as of right his jury conviction of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (person under thirteen years old).

On appeal, defendant argues that he was denied his constitutional right to confront the child witness against him when the trial court allowed a support person to sit with the witness during her trial testimony. We disagree. Because defendant did not raise this constitutional issue below, it is reviewed for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

The right of an accused to confront the witnesses against him is guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Bean*, 457 Mich 677, 682; 580 NW2d 390 (1998). This right includes both the right to be present at all stages of the trial and the right to a face-to-face confrontation with the witnesses against him. *Id.*; *People v Burton*, 219 Mich App 278, 287; 556 NW2d 201 (1996). The central purpose of the Confrontation Clause is to ensure the reliability of the evidence by subjecting it to rigorous testing in an adversarial proceeding, including by cross-examination before the trier of fact. See *People v Sammons*, 191 Mich App 351, 356; 478 NW2d 901 (1991).

Here, defendant does not allege that the victim failed to appear, testify, or submit to cross-examination. Instead, defendant claims that his right to confront the victim was denied because her father was allowed to sit with her during her testimony. But, MCL 600.2163a(4) provides: “A witness who is called to testify shall be permitted to have a support person sit with, accompany, or be in close proximity to the witness during his or her testimony.” Nevertheless, defendant argues, he was not provided the proper notice with regard to the use of this support person during the victim’s testimony. But even if that were true, defendant has failed to indicate how his right to confront the victim was denied by this lack of notice related to the use of the

support person. Contrary to the factual circumstances present in the cases defendant relies upon in support of his claim, here defendant was face-to-face with his accuser and her testimony was cross-examined before the jury.¹ Therefore, defendant's right to confront this witness was not denied and he has failed to establish plain error affecting his substantial rights.

Next, defendant claims in his Standard 4 Brief that his federal and state rights to a fair trial and due process were infringed by the amendment of the information right before trial with regard to the date of the offense and by the prosecution's failure to establish the exact date of the offense at trial. We disagree. Whether a defendant's right to due process has been violated is reviewed de novo on appeal. *People v McGhee*, 258 Mich App 683, 699; 672 NW2d 191 (2003). A trial court's decision whether to permit amendment of an information is reviewed for an abuse of discretion. *Id.* at 686-687.

MCL 767.45(1)(b) mandates that the information contain "[t]he time of the offense as near as may be" but "[n]o variance as to time shall be fatal unless time is of the essence of the offense." And MCL 767.51 states:

Except insofar as time is an element of the offense charged, any allegation of the time of the commission of the offense, whether stated absolutely or under a videlicet, shall be sufficient to sustain proof of the charge at any time before or after the date or dates alleged, prior to the finding of the indictment or the filing of the complaint and within the period of limitations provided by law: Provided, That the court may on motion require the prosecution to state the time or identify the occasion as nearly as the circumstances will permit, to enable the accused to meet the charge.

MCL 767.51 "clearly endows the trial court with discretion to determine when and to what extent specificity will be required." *People v Naugle*, 152 Mich App 227, 233; 393 NW2d 592 (1986). "Nonetheless, . . . certain factors should be included in making such a determination, including but not limited to the following: (1) the nature of the crime charged; (2) the victim's ability to specify a date; (3) the prosecutor's efforts to pinpoint a date; and (4) the prejudice to the defendant in preparing a defense." *Id.* at 233-234.

Here, first, the crime charged was criminal sexual conduct against a child. In such cases, time is not of the essence or a material element. See *People v Dobek*, 274 Mich App 58, 83; 732 NW2d 546 (2007). Second, the child victim could not specify a date, which is fairly typical considering that children often have difficulty recalling precise dates. See *People v Howell*, 396 Mich 16, 27 n 13, 28; 238 NW2d 148 (1976). Third, it appears that the prosecutor undertook a reasonably thorough investigation in an attempt to pinpoint a specific date before setting forth

¹ Defendant relies on *Maryland v Craig*, 497 US 836; 110 S Ct 3157; 111 L Ed 2d 666 (1990) and *Coy v Iowa*, 487 US 1012; 108 S Ct 2798; 101 L Ed 2d 857 (1988) in support of his argument. But in *Craig* the child witness was properly permitted to testify by closed circuit television and in *Coy* the victim was impermissibly allowed to testify from behind a large screen; neither of these unusual circumstances were present in this case. See *Craig*, *supra* at 857; *Coy*, *supra* at 1020.

the amended offense date of between November 2003 and March 4, 2004. See *Naugle, supra* at 234.

And, fourth, in light of the facts of this case, the prejudice to defendant's ability to present an alibi defense, as he argues, is not persuasive. An alibi essentially attempts to establish that the defendant was not present when the crime was committed. See *People v McGinnis*, 402 Mich 343, 345; 262 NW2d 669 (1978); see, also, 21 Am Jur 2d, Criminal Law § 219. Both defendant and the victim lived in the same house at least on Wednesdays and some weekends for an extended period of time—between November 2003 and March 4, 2004—and the victim was often accessible to defendant. Thus, it appears that creating a viable alibi defense was not a realistic option. See *Naugle, supra* at 235. Further, because time is not an element of the charged offense, the prosecution was not required to prove the exact date of the offense beyond a reasonable doubt. See *id.* In sum, defendant has failed to establish that he was denied due process and the trial court's decision to permit the amendment to the information did not constitute an abuse of discretion.

Next, defendant argues that he was denied the effective assistance of counsel. We disagree. Because a *Ginther*² hearing was not conducted, our review is limited to mistakes apparent on the record. See *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005).

To establish ineffective assistance of counsel, a defendant must prove that his counsel's performance fell below an objective standard of reasonableness and that, but for such deficient performance, the result of the proceedings would have been different. See *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). Appellate courts will not substitute their judgment for that of counsel regarding matters of trial strategy. *People v Marcus Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy" *Id.*

First, defendant claims his attorney was constitutionally deficient because he did not request a continuance after the information was amended so as to allow for the preparation of an alibi defense. But, as discussed earlier, the time of the offense as near as could be established was between November 2003 and March 4, 2004—an extended period of time for which an alibi defense was not a realistic option. Therefore, it was not unsound or unreasonable for defense counsel to opt not to request a continuance. See *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

Defendant's second claim of ineffective assistance is premised on the fact that his attorney did not question the officer who observed an interview of the victim about the actual date the offense was committed. But, we will not second guess counsel on matters of trial strategy, including what questions to ask witnesses. See *Davis, supra*. In any event, the record establishes that the victim could not specify the exact date of the assault.

² *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Defendant also claims that his counsel was ineffective for failing to request a jury instruction on the defense of alibi. But at trial defendant did not produce alibi evidence relating to the entire timeframe of November 2003 to March 4, 2004. And the witness testimony about defendant being in a pool league during some time in February was insufficient to support an alibi defense. Therefore, defendant was not entitled to the jury instruction and his counsel was not ineffective for failing to make such a motion. *Darden, supra*.

Defendant finally argues in his Standard 4 Brief that the trial court abused its discretion when it failed to give a jury instruction on the defense of alibi. But, for the reason discussed above—that defendant’s evidence with regard to his playing pool during some time in February of 2004 was insufficient evidence to support an alibi defense—this argument is without merit. The jury instruction was not warranted. See CJI2d 7.4.

Affirmed.

/s/ Michael J. Talbot
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter